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No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATION,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

RESPONSE BY THE STATE OF NEW HAMPSHIRE TO THE MOTION OF CERTAIN ELECTRIC UTILITIES FOR LEAVE TO INTERVENE AND LEAVE TO FILE A COMPLAINT

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April 29, 1992 * *Counsel of Record*

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Pursuant to Rule 21.4 of the Rules of the United States Supreme Court, the State of New Hampshire, by its attorneys, opposes the Motion of the United Illuminating Company, New England Power Company, Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant (collectively "the Utilities") for Leave to Intervene and for Leave to File a Complaint in this action.

The Utilities' motion raises a fundamental question about the nature of this case and the real parties in interest. If the burden of the tax falls upon the Utilities, as they assert, they are the proper plaintiffs to challenge the Nuclear Property Tax and this is not a controversy between two or more states

over which this Court should exercise original jurisdiction. If the burden of the tax falls upon Plaintiffs' citizens, and this Court allows the States to proceed as *parens patriae*, they are the proper and exclusive representatives of their citizens and the Utilities are no more entitled to intervene than any other party who seeks to raise a separate voice on behalf of these citizens.

The Utilities are correct that they are the taxpayers subject to the tax and that the States and their citizens are merely customers who will only pay the tax if the utility regulatory agencies permit the tax to be passed through in rates. That being the case, the States, in seeking original jurisdiction of the Court, were acting on behalf of the Utilities, rather than as *parens patriae*, which is not an appropriate basis for the Court to exercise original jurisdiction.

If The Utilities' Bear The Burden Of The Tax, This Case Is Not Properly Before This Court On Original Jurisdiction

If the burden of the tax falls upon the Utilities, then this is not the Plaintiffs' case, and the exercise of original jurisdiction is inappropriate. In arguing for original jurisdiction, Plaintiffs contended that the Nuclear Property Tax was "recoverable from the ultimate consumers of electricity, including the Plaintiffs in the form of increased rates" and therefore Plaintiffs had standing to bring this case on the consumers' behalf. (Plaintiffs' Brief in Support of Motion for Leave to File Complaint at 17). The Utilities' Brief argues that the Plaintiffs do not have such a direct interest in this suit. Rather, the Utilities claim that it is they, rather than the States, that are "directly responsible for payment of the Seabrook Tax" and that "they have the most direct possible stake" in the constitutionality of the tax. (Utilities' Br. at 3-4). Thus, the Utilities confirm what New Hampshire argues in opposing original

jurisdiction initially — the Plaintiffs' interest in this litigation "exists only to the extent that the Seabrook Tax is passed on." (*Id.* at 6). To the extent costs are not passed through, the Utilities properly note, "the States have asserted no particular stake in the outcome" of this litigation. (*Id.* at 7).

Because it is the Utilities and not the Plaintiffs or their citizens that pay the Nuclear Property Tax and because it is not clear whether the tax will be passed through in the form of higher rates, the Plaintiffs, in suing here, are prosecuting claims that properly belong to the Utilities. The Utilities are entitled to pursue the remedies available to them to challenge the tax, but they have no right to bring an original action in this Court. The Plaintiffs' effort to initiate this litigation for the Utilities should not enlarge their choice of remedies.

Instead, because the Plaintiffs are attempting to bring the Utilities' case for them, the effort to invoke this Court's original jurisdiction should fail and the Utilities should proceed in a proper forum available to them. As this Court noted in *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976):

> **A State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.**

See also Oklahoma ex rel Johnson v. Cook, 304 U.S. 387, 394 (1938) (A state's ability to sue as *parens patriae* "does not go so far as to permit resort to [the Supreme Court's] original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy"); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (State cannot sue for flood damage to farmers' land); *Oklahoma v. Atchinson, Topeka & Santa Fe Railroad*, 220 U.S. 277, 289 (1911) (State cannot sue to challenge freight

rates affecting railroad shippers in state); *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (original jurisdiction rejected, *inter alia*, because the State made no showing that the affected private companies could not more speedily and conveniently raise the issues at stake); XII *Moore's Federal Practice* §350.02(3) at 3-18 n.3 ("In order to properly invoke this jurisdiction, the State must bring an action on its own behalf and not on behalf of particular citizens.")

In *Arizona v. New Mexico*, 425 U.S. 794 (1976), a State attempted to sue in its proprietary capacity as a consumer of large quantities of electrical energy generated in another state and as *parens patriae* for its citizens who consumed and paid for that energy. This Court determined that the State was not properly acting as *parens patriae* and that it was inappropriate to exercise original jurisdiction. The Court noted that the utilities affected by the New Mexico tax had the right to sue to vindicate their interests and, in fact, had brought such a suit in New Mexico State Court. The utilities' suit provided an appropriate forum for litigating the issues, which the States sought to raise as an original matter. *Id.* at 797. Here, too, the Utilities have both administrative and judicial remedies available.[1] By seeking original review in this Court, the Utilities have short-circuited the appropriate review process.

If Plaintiffs' Citizens Bear The Burden Of The Tax There Is No Compelling Interest Justifying the Utilities' Intervention

If Plaintiffs' citizens bear the burden of the tax, the Utilities have no right and no reason to add their voices to the State's as advocates for the interests of the Plaintiffs' citizens. As

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[1]Two of the utilities subject to the tax have already made their payments under protest and have advised New Hampshire of their intent to seek refunds under the administrative procedure provided by RSA 83-D:10.

New Hampshire stated in its response to the Connecticut Consumer Counsel's motion to intervene, ordinary standards for intervention do not apply to cases invoking the original jurisdiction of this Court by States in their role as *parens patriae*. When the State acts as *parens patriae*, it is deemed to speak for all of its citizens, and individual citizens ordinarily have no right to separately intervene. *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930); *Utah v. United States*, 394 U.S. 89, 95-96 (1969). The need for a particularly restrictive approach toward intervention in *parens patriae* cases has been clear since this Court's decision in *New Jersey v. New York*, 345 U.S. 369 (1953). There, the Court denied the City of Philadelphia's motion to intervene to assert its interest in a dispute over distribution of water from the Delaware River. The State of Pennsylvania was already a party to the case in its *parens patriae* capacity. In denying intervention, the Court stated:

> **An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.**

345 U.S. at 373.

The restrictive intervention test established in *New Jersey* continues as a sound and practical limitation on the number of parties who may speak for the interests of citizens of a state. The rule was cited with approval in *United States v. Nevada*, 412 U.S. 534, 538 (1973) - another water rights dispute - in which the Court noted that individual users of water "ordinarily would have no right to intervene in an original action in this Court." The rule of limiting intervention in *parens patriae* cases, "prevent[s] those cases from becoming time consuming

multi-party litigation." *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Ctr. 1979).[2]

Also, there is no need to admit the Utilities for discovery purposes, as they have asserted. (Utilities Br. at 8). The Utilities and the States assert that this dispute is not fact-based. If that is so, the information needed concerning the effect of the Nuclear Property Tax on the Utilities is available either through the public filings made by these regulated companies, or through the tax return filings made with New Hampshire.

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[2]The Utilities argue for a different result, citing *Maryland v. Louisiana*, 451 U.S. 725 (1981), where the Court permitted certain pipeline companies to intervene in a *parens patriae* case. New Hampshire concedes that the *Maryland v. Louisiana* Court took a liberal approach to the intervention question - an approach that departed from the restrictive rule of *New Jersey v. New York*. But special considerations present in *Maryland v. Louisiana*, and not present here, may have influenced the Court's approach. There were multiple reasons for the Court to exercise original jurisdiction in that case. First, the case involved an effort by a State to impose a severance tax on gas extracted from *federal* land, distinguishing the case from *Arizona v. New Mexico*, which "did not sufficiently implicate the unique concerns of federalism forming the basis for [the Court's] original jurisdiction." 451 U.S. at 743. Noting the important federal interests at stake, the Court allowed the United States and the Federal Energy Regulatory Commission to intervene and, having done so, then permitted the pipeline companies to intervene on their separate motion. After allowing the "federal" parties to intervene, the decision to admit the pipeline companies as well may have seemed less significant and the principle of limiting representatives in *parens patriae* cases less relevant. In addition, the tax at issue was one of unique magnitude, involving over $150 million annually, and was being passed on to consumers in over 30 states, making it "[u]nlike the day-to-day taxing measures" which the Court might otherwise decline to consider. 451 U.S. at 744. In light of the importance of the case and the separate and independent grounds for entertaining jurisdiction, it is possible that the Court concluded that an exception to the restrictive intervention standards for *parens patriae* cases was appropriate. But, whatever considerations led to the decision to allow intervention there, should not cause the Court to relax the rule of *New Jersey v. New York* in this case.

Thus, if the Plaintiffs have properly invoked the Court's original jurisdiction, there is no role for the Utilities in this case. Their pleading raises no claims or issues not being raised by the Plaintiffs, and Plaintiffs will adequately represent the interests of their consumers. Under *New Jersey v. New York*, Plaintiffs are the exclusive representatives of the interests of their consumers. The Utilities should not be permitted to speak for them as well.

CONCLUSION

For these reasons, the State of New Hampshire respectfully requests that the Motion of the United Illuminating Company, Inc., New England Power Company, Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant for Leave to Intervene and for Leave to File a Complaint be denied.

Respectfully submitted,

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